United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1497

To be argued by
ALAN M. GOLDSTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1497

UNITED STATES OF AMERICA,

Appellee,

—v.—

DUDLEY MORGAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

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Preliminary Statement

Dudley Morgan appeals from a judgment of conviction entered on August 27, 1976 in the United States District Court for the Southern District of New York, after a seven-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 75 Cr. 1141, in thirty-six counts, was filed on November 24, 1975. Count One charged Victor Danenza, Frank Dell'Aglio, K. Cyrus Melikian, Michael Brodsky and Triple Management, Inc., with conspiracy to violate the federal securities laws (Title 18, United States Code, Section 371). Counts Two and Three charged Danenza, Dell'Aglio, Melikian, Brodsky and Triple Management, Inc. with violations of the antifraud provisions of the federal securities laws (Title 15, United States Code, Sections 77q(a) and 78j(b)) in connection with the fraudu-

lent distribution of securities of Display Sciences, Inc. Counts Four through Twenty-one each charged Danenza, Dell'Aglio, Triple Management and Dudley Morgan with mail fraud, in violation of Title 18, United States Code, Section 1341. Counts Twenty-Two through Thirty-two each charged Danenza, Dell'Aglio, Morgan and Triple Management with engaging in an unregistered distribution of securities, in violation of Title 15, United States Code, Section 77(e). Counts Thirty-three and Thirty-four charged Danenza, Dell'Aglio, Morgan and Triple Management with engaging in fraudulent securities transactions, in violation of, respectively, Title 15, United States Code, Sections 77q(a) and 78j(b). Counts Thirty-five and Thirty-six charged Danenza and Triple Management with tax evasion in violation of Title 26, United States Code, Sections 7201 and 7203.

Defendant Brodsky died subsequent to the filing of the indictment. Prior to trial, Dell'Aglio and Melikian pled guilty to a portion of the indictment.* Danenza has been and continues to be a fugitive. Since Danenza and Triple Management were closely associated, the case against Triple Management was not tried in Danenza's absence. Therefore, Morgan alone stood trial.

Trial commenced on August 18, 1976. Due to a substantial overlap of substantive charges and for reasons of economy, only the mail fraud counts (Counts Six through Eleven, Fifteen through Nineteen and Twenty-one) and the securities fraud counts (Counts Thirty-three and Thirty-four), were tried and submitted to the

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* On May 17, 1976, Dell'Aglio pled guilty to Count Thirty-four, and on September 24, 1976 he was sentenced to one year of probation. On August 11, 1976 Melikian pled guilty to Count Three, and on September 24, 1976 he was sentenced to one year of probation and fined $5,000.

jury.* The trial concluded on August 27, 1976, when the jury convicted Morgan on all fourteen counts submitted.

On October 8, 1976, Judge Wyatt sentenced Morgan on each count to concurrent terms of two years' incarceration, twenty-two months of which were suspended, and placed Morgan also on probation for two years.

Morgan is at liberty pending appeal.

Statement of Facts

A. The Government's Case

1. Synopsis

The Government's proof established that in 1972 Morgan engaged in a scheme to sell unregistered securities of Display Sciences, Inc. ("DSI") by making false statements and by failing to disclose material information about DSI and the offering. Morgan was able to orchestrate the unregistered offering from his position as manager of the Tulsa, Oklahoma office of Van Alstyne Associates, a New York based securities brokerage firm. In the course of the offering, he and the salesmen he supervised led their customers to believe that DSI's capital structure was strong and that the company's business prospects were bright, when in fact DSI was in receivership and the principal use of the proceeds of this offering, over $100,000, would be to finance a settlement of existing debts. In addition, Morgan and his salesmen neglected to reveal that the shares being sold were unregistered and

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* During the course of the trial, Count Twenty was dismissed due to the absence of a scheduled Government witness.

that Morgan sought to motivate his salesmen to push DSI stock by offering them bonuses of DSI stock as rewards for their sales.*

2. Background

DSI was incorporated in July 1968 in New York, to engage in the design and manufacture of large-screen television projection equipment. Frank Dell'Aglio, the Government's principal witness, was a founder of the company and Chairman of its Board. Anticipating an expansion of its business to meet expected orders of a major new customer, DSI had gone public in January 1970, in an offering underwritten by a predecessor of Van Alstyne. Thereafter, DSI was obligated under the federal securities laws (15 U.S.C. §§ 78o(d), 78m(a), 17 CFR §§ 240.13a-1, 240.15d-1) to file periodic reports ("Form 10-K") with the Securities and Exchange Commission. (Tr. 70-74).**

In June 1970, after the public offering, the company began to suffer losses. Morgan, who had met Dell'Aglio sometime shortly after the offering and had, on borrowed money, invested heavily in DSI stock, started calling Dell'Aglio both at DSI and at home to find out "how things were going." (Tr. 77). Morgan was irate at the deteriorating financial condition of DSI. (Tr. 75-79), and on one occasion, Morgan called Dell'Aglio at home in the latter part of the summer of 1970, "very angry about the situation, where all the money had gone . . .

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* The salesmen were not indicted on the theory that they relied on information given to them by Morgan and did not know that the information was false.

** "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to the appellant's brief; "App." refers to the appellant's appendix.

He said 'You know you have a Mafia up there, we have an Oklahoma Mafia here.'" (Tr. 79).

In early 1971, in an effort to raise additional funds, DSI had, on Morgan's recommendation, entered into an agreement with Melikian and Brodky, two Philadelphians, whereby Melikian and Brodsky were to provide money to keep DSI in operation, in exchange for control of DSI and an option to purchase 400,000 shares of DSI stock. (Tr. 80-88). Nonetheless, DSI's financial condition continued to decline, the company continued to lose money, and "creditors were becoming a problem." (Tr. 93). Morgan was kept advised of these developments and, in response to Dell'Aglio's inquiry as to whether money could be raised, said that he couldn't help. (Tr. 90-94).

3. The Receivership of DSI

By mid-summer 1971, Dell'Aglio had contacted Erwin Pincus, a Philadelphia attorney specializing in insolvency matters, to seek advice about DSI's pressing creditor-problems. Dell'Aglio needed $5,000 for Pincus' retainer, which he first sought to borrow from Morgan, explaining that he needed $5,000 to pay to Pincus to start the creditor arrangement. (Tr. 93-96, 258-62).

Pincus suggested that DSI seek a common law settlement with its principal creditors, with whom he arranged a meeting in the late summer of 1971. He then reported back to Dell'Aglio that at least $10,000 would be needed as "earnest money" to permit a settlement to go forward. In September, however, the creditors obtained a show cause order in New Jersey state court for the appointment of a receiver. (Tr. 97-101, 263-66). Dell'Aglio relayed this information to Morgan and was again re-

buffed when he solicited a loan for the $10,000 earnest money. (Tr. 98-102). In November 1971, a receiver for DSI was appointed, of which fact Morgan was promptly notified. (Tr. 103-10). Morgan observed to Dell'Aglio that before they could raise money to get DSI out of receivership, they first "would have to replace Philadelphia . . ." (i.e., Melikian and Brodsky). (Tr. 110).

4. The Issuance of DSI Stock

In January 1972, through a mutual acquaintance, Dell'Aglio met Victor Danenza, who undertook to help with the financial plight of DSI. In February 1972, Danenza, using Triple Management as his nominee, purchased 40,000 restricted shares of DSI from another founder of DSI, and transferred this stock to a Canadian brokerage house, Andras, Hatch & Heatherington. Morgan was told about this transaction shortly thereafter. (Tr. 123-27).

Between Dell'Aglio and Danenza it was concluded that the overhang of the 400,000 share option to Melikian and Brodsky was an impediment to fund raising. Dell'Aglio discussed this problem with Morgan. (Tr. 115-19). In February or March 1972, at Danenza's suggestion and with Morgan's knowledge and approval, DSI effected a cancellation of the troublesome option by, in effect, buying it back for 100,000 shares of DSI stock. In May 1972, Danenza purchased the newly issued DSI stock from Melikian and Brodsky for himself, through Triple Management. (Tr. 127-33).

After consummation of these transactions, Dell'Aglio advised Morgan that the new DSI shares had been issued and the option cancelled. Morgan replied, "We could now go forward with the company." (Tr. 132-34, 139).

5. Business Developments at DSI

Throughout 1972, through a proposed joint venture with the Walter Reade theatre organization, DSI was trying to get into the off-track betting market with its video projection equipment, particularly in Connecticut. Although several demonstrations were held, it is undisputed that, in 1972, these efforts never got beyond the proposal stage, a fact which was at all times verifiable by a telephone call to Connecticut. Late in that year, in November, DSI was first advised that it was among five finalists for the state contract (which was ultimately awarded to a competitor). (Tr. 368-78).

6. The Fraudulent Distribution Scheme

In May 1972, the DSI shares issued to Melikian and Brodsky were purchased by Danenza, who transferred most of the shares, again in the name of Triple Management Co., to Andras, Hatch in Canada. In early May 1972, Danenza spoke to Morgan and explained his plan to sell some of his DSI stock and to use the proceeds to pay off the creditors. Morgan replied, "I couldn't sell all the stock to pay off the creditors at once. I will have to sell it as I can." (Tr. 140-41).

Danenza put Morgan in touch with Tom Karrys, a broker at Andras, Hatch who handled the Triple Management account. Danenza told Karrys to take instructions from Morgan on DSI shares to be sold from Danenza's nominee account at Andras, Hatch to Morgan's firm in Tulsa. (Tr. 296-98). Morgan was by then manager of the Tulsa brokerage office of Van Alstyne Associates, successor to J. S. Love.* In several conversations in

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* In the spring of 1972, Morgan asked his firm to become a market maker in DSI stock, but was told by the head office that it would not do so and would execute agency trades only. In May 1972, Morgan set up through Van Alstyne's New York office the block trade with Andras, Hatch. (Tr. 335-47).

May 1972, Morgan instructed Karrys to sell 39,100 shares DSI from Triple Management's account to Van Alstyne for approximately $108,000. (Tr. 300-03). At no time did Morgan ask Karrys any questions about the stock, nor did Morgan inquire whether the stock were "restricted" or "freely tradeable." (Tr. 330).

7. The Application of the Proceeds

By May 1972 Morgan had already invested for himself and his family over $100,000 in DSI stock, an investment of dubious value if DSI failed to recover financially. Moreover, he had pledged his stock as collateral for personal loans. (Tr. 1324-25). Sometime in the late spring of 1972, Morgan called Pincus in Philadelphia, to find out how much money DSI would need to settle with its creditors and get out of receivership. Pincus told Morgan "as best I could at that time what moneys I would need to compromise the creditors, to pay taxes, to pay the cost of the receivership, to pay counsel fees to the attorney for the receiver and to pay other expenses that were attendant to getting the company out of receivership." (Tr. 269-71).

Thereafter, Pincus began receiving money from Dell'Aglio. Dell'Aglio received this money from Danenza who in turn obtained it from the proceeds of sales of DSI stock by Morgan. (Tr. 141, 149-52). From time to time in May and June 1972, Morgan would call Pincus to ascertain how much money Pincus had received for DSI. At times, Morgan questioned and Pincus explained again the nature of the receivership expenses. (Tr. 272-77). On June 28, 1972, based on the funds then in hand, application was made to dissolve the receivership, and an order dissolving the receivership was entered on July 11, 1972. (Tr. 273).

8. The Sales Effort at Van Alstyne (Tulsa)

Four salesmen who worked under Morgan at Van Alstyne's Tulsa office during 1972 testified as to their efforts to sell DSI stock in May and June 1972. Each testified that he received from Morgan, in May 1972, sales literature on DSI. (Morgan conceded that he had prepared the materials.*) The written sales literature, as well as oral representations derived from the literature, was passed along to customers of Van Alstyne. (Tr. 396, 449, 468, 491-92). In a sales meeting prior to the effort to sell DSI stock, Morgan told his salesmen that he wanted to sell a block of DSI which was coming from Canada, and that the proceeds of the sale would be going to the company. (Tr. 444). Morgan never told any of his salesmen, however, that DSI was then in receivership. (Tr. 406-7, 448, 470, 493). Morgan also offered to obtain shares of DSI for his salesmen as additional compensation. (Tr. 414-15, 451, 471, 492).

Among misrepresentations contained in the sales literature and communicated to Van Alstyne's customers were the statements that:

a) DSI had received a letter of intent from the State of Connecticut for the off-track betting program, and that a contract would be forthcoming shortly. In

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* Van Alstyne had a firm policy, in which Morgan had been instructed, discouraging the use of sales literature ,and strictly requiring that all sales literature had to be cleared with in-house counsel at the home office in New York. No copies of the 1972 sales literature relating to DSI ever found their way to Van Alstyne's New York office. An inference may be drawn that none were sent. (Tr. 508-11). On a previous occasion, Morgan had, contrary to firm policy and the instructions of a superior, used sales literature in connection with a cattle-feeding program. (Tr. 815-16).

fact, DSI never came closer to a contract with Connecticut than being designated one of the five finalists, and even that was not communicated to DSI until five months after the sales by Morgan and his salesmen. (Tr. 368-78).

b) DSI had only 325,000 shares outstanding. The prospectus of DSI, a copy of which was in Morgan's office, disclosed that in 1970 DSI had 595,750 shares outstanding, and, as Morgan was aware, additional shares had also been issued to the Philadelphia group.

Moreover, none of the literature which Morgan drafted disclosed, nor did Morgan ever tell either his salesmen or his customers:

a) that DSI was insolvent, in receivership, and using the proceeds of the offering to pay its debts and to finance a settlement with creditors, (Tr. 534, 561, 642-43) or

b) that the DSI shares then being sold were unregistered.

Finally, various customers testified that they had dealt with Morgan or the salesmen under his supervision and that they had purchased shares of DSI in 1972 based on the foregoing misrepresentations and omissions. (Tr. 525-668).

B. The Defense Case

The defense presented seven witnesses: Morgan, his wife, and five witnesses who testified primarily as to Morgan's character, integrity and truthfulness. The thrust of Morgan's defense was good faith. He claimed that he had relied on misinformation supplied to him by DSI management, primarily Dell'Aglio, and that when he passed that information along to his salesmen and customers, he was unaware that it was materially incomplete or false.

Mrs. Joan Morgan, the defendant's wife, testified as to three occasions on which he had spoken with Dell'Aglio. In October 1971 Dell'Aglio had told her that DSI's future looked promising. In June 1972, she stated, Dell'Aglio had told her that Connecticut had signed a letter of intent. (Tr. 673-74). Finally, she testified that in the late summer or early fall of 1972, Dell'Aglio had telephoned for her husband and, finding him not at home, had told her, "Whatever happens I want you to remember that I did what I did because I had to." (Tr. 675). On cross-examination, Mrs. Morgan testified that she had not heard or participated in any of her husband's conversations with Dell'Aglio, nor had he informed her of all such conversations. (Tr. 677-78). Furthermore, Morgan had never told her at all of his conversations with Pincus. (Tr. 678).

Norman Roberts, a former principal of Van Alstyne, testified that in early 1972, Dell'Aglio had stated that DSI was anticipating a contract from the State of Connecticut, and that DSI already had a letter of intent. (Tr. 734-37). He also testified as to his opinion of Morgan's honesty, integrity and truthfulness, as well as Morgan's reputation for those qualities. (Tr. 743). On cross-examination, Roberts testified that he did not participate in, or listen to, any of Morgan's conversations with Dell'Aglio. (Tr. 750-51). Roberts also testified that his opinion of Morgan would change if Morgan in fact knew DSI was in receivership at the time he was selling DSI stock and did not tell that to his customers. (Tr. 763).

James Pratt, an attorney and the former partner in charge of compliance at Van Alstyne, testified that interoffice memos of a brokerage firm need not be submitted to the New York Stock Exchange or the Securities and Exchange Commission, nor is all sales literature necessarily required to be filed with the Securities and Ex-

change Commission. (Tr. 809-11). Pratt also testified as to his opinion that Morgan was honest and had integrity. (Tr. 808). On cross-examination, however, Pratt stated that in the past Morgan had made unauthorized use of sales literature, contrary to Pratt's instruction. (Tr. 813-15). He also testified that Van Alstyne's rules proscribed dissemination of sales literature without prior clearance from the compliance department and that the DSI sales literature written and disseminated by Morgan had not been submitted for approval. (Tr. 816).

Richard McMahon had known Morgan from grade school, and had purchased approximately 3,000 shares of DSI through Morgan, half purchased in 1970 and half in 1972. (Tr. 848-49, 852). McMahon testified as to his favorable opinion of Morgan's integrity, honesty and truthfulness, but on cross-examination stated that his opinion would change if Morgan had known of DSI's receivership and not told McMahon that fact when he sold him shares of DSI. (Tr. 850, 854).

Raymond Hall, Jr. was a social and business acquaintance of Morgan who had purchased DSI stock through him. (Tr. 855-57). Hall testified that he believed Morgan to be completely truthful. (Tr. 857).

Ralph K. Bogart, Hall's partner in the insurance business, also testified as to Morgan's honesty, integrity and truthfulness. (Tr. 863-65). On cross-examination, he stated that he would change his opinion about Morgan if Morgan sold shares of stock in a company, knowing the company to be in receivership, but without disclosing that fact. (Tr. 869). He also testified that Morgan had told him, in 1972 that DSI was a "new stock coming out and it was really different, different than anything he had

ever been involved in . . ." (Tr. 879). In fact DSI had been public for two years, as Morgan well knew since he had worked on the original underwriting.

Finally, Dudley Morgan testified in his own defense. His testimony was, in substance, that from 1970 through 1972, Morgan purchased DSI stock for himself and his family. (Tr. 685-87). He denied that he ever made any statement to the effect that "the Philadelphia group would have to go." (Tr. 913).

On April 19, 1972, Dell'Aglio or Danenza indicated that DSI had to raise $25,000 to finance its offtrack betting operations. (Tr. 700-01). Morgan thereupon arranged with Tom Karrys for the purchase by his firm of a block of DSI stock from Andros, Hatch. (Tr. 701). Karrys assured him that the stock was unrestricted and constituted good delivery. (Tr. 701, 935). Although he had initially agreed to move only $25,000 (or 8,000 shares) of DSI, Morgan and his salesmen sold about $118,000 (or 39,000 shares) of DSI from May to June 1972). (Tr. 702-04, 930).

Although Morgan did speak with Pincus about the funds Pincus was receiving from DSI and knew that Pincus was handling the payment of DSI's debts, he did not understand that the proceeds of the sale of stock were being used for that purpose. Morgan also attested that he was never informed of Pincus' true role or of the receivership proceedings for DSI. (Tr. 704-09, 888, 928, 953).

The "sales literature" prepared by Morgan was not intended for distribution to customers, but was intended for internal use. (Tr. 710-11). The information contained therein was obtained primarily from Dell'Aglio. (Tr. 712-16, 724-25, 776). As to the error in the number

of shares outstanding (Morgan had written 325,000, when over 600,000 was correct), Morgan had meant to refer only to the number of shares in the hands of the public rather than the total share ownership of DSI. (Tr. 719). Morgan could not recall the reason for misstatements as to DSI's financing prospects. (Tr. 721).

Morgan admitted writing to Dell'Aglio in July 1972 that "a letter is in order . . . stating that restricted shares have been earned by the various people in Tulsa who have raised money . . . the past 90 days to keep the company out of bankruptcy." (GX 10). He wrote this, however, only at the instance of his salesmen, not believing bonus stock would be granted and harboring reservations as to the ethics or legality of such a bonus. (Tr. 772-73, 994-99).

Morgan's efforts in selling DSI stock in 1972 earned him only $2,000 in commissions. (Tr. 785).

On cross-examination, Morgan repeated his principal denials of actual knowledge. He also testified that his misstatement as to the number of shares of DSI outstanding in May 1972 was an error on his part resulting from his failure to check the 1970 prospectus of DSI. (Tr. 977-78). That prospectus was lying within reach on a counter in Morgan's office. (Tr. 1011). Morgan also testified that, despite the availablity of the prospectus, the error was due to his reliance on information from Dell'Aglio. (Tr. 978).

In contrast to Morgan's claim on direct examination that his investment in DSI evidenced his belief in its financial well-being, on cross-examination he testified that almost all of the DSI stock he personally owned was bought, before the period of DSI's insolvency. (Tr. 980).

Although he realized the crucial significance of having a current annual report (10-K) of DSI on file, and recalled discussion with Dell'Aglio on the subject of filing such a report, he did not bother checking to see if that had been done until 1973. (Tr. 982-85).

Morgan admitted that he had never seen the letter of intent from the state of Connecticut which he had featured in the DSI sales literature. (Tr. 1024). He claimed, however, that he was sufficiently concerned to call an official of the State of Connecticut to confirm the facts about the letter. The official was not in and failed to return Morgan's call. (Tr. 1016). Curiously, Morgan could not recall whether his attempt to confirm this information was before or after he included it in the DSI sales literature which he had prepared. (Tr. 1022).

ARGUMENT

POINT I

No Error Was Engendered By A Witness' Use of the Word "Mafia."

Morgan first complains of the trial court's refusal to strike or to limit certain testimony by the Governments' witness Dell'Aglio in which the word "Mafia" was used. This issue arises from Dell'Aglio's testimony about communications between himself and Morgan regarding DSI's deteriorating financial condition. When asked to relate such communications, Dell'Aglio responded by characterizing Morgan as "angry." The Court instructed the witness not to state conclusions and to state what Morgan had said. The witness then answered: "He (Morgan) . . . said 'you know you have a Mafia up there,

we have an Oklahoma Mafia here.'" (Tr. 79). The witness' answer, not initially sought by the prosecution, complied with the court's instruction to use the actual words of the defendant.

The evidence was generally relevant to show Morgan's anger about DSI's deteriorating financial situation and the desperate extreme to which that anger had driven him. On appeal he argues that the probative value of this evidence was exceeded by its prejudicial impact. F.R. Ev. 403. Of course, such matters are generally left within the wide discretion of trial court. *United States* v. *Robinson*, 544 F.2d 611, 616 (2d Cir. 1976); *United States* v. *Harvey*, 526 F.2d 529, 536 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976). Judge Weinstein's treatise emphasizes that "the better approach on the question of admissibility is to view both probative force and prejudice most favorably towards the proponent, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." Weinstein, Evidence ¶ 403[03] (1975).

Morgan exaggerates the prejudicial impact here by claiming that this evidence was used to link him to the Mafia. In fact, the opposite is true. In summation, the prosecutor argued that the remark was merely "another example of [Morgan's] puffing and misstatements." (Tr. 1061). This approach by the prosecution makes this case quite similar to a recent decision of this Court, *United States* v. *Schwartz*, Dkt. No. 76-1324, slip op., 1535, 1543 (2d Cir. Jan. 25, 1977) in which a defendant similarly claimed that the use of the word "Mafia" infected his trial. The Court found no prejudice and no error, noting that "the prosecutor said in so many words that he knew it was 'totally untrue' that [the defendant] had 'Mafia' connections . . ." *United States* v. *Schwartz*, *supra* at 1543.

The cases which Morgan advances, while containing fragmentary *dicta* useful to his argument, did not reverse convictions for mere use of the term "Mafia." *United States* v. *Catalano*, 491 F.2d 268 (2d Cir. 1974), *cert. denied*, 419 U.S. 825 (197[illegible] (conviction affirmed notwithstanding admission of evidence as to defendant's use of alias for gambling trip); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975) ("references indirect and non-prejudicial"); *United States* v. *Meagley*, 239 F.2d 637 (7th Cir. 1957) (reversal for use of concededly irrelevant and prejudicial prior offense of the defendant).* The use of the word "Mafia" is not *per se* prejudicial and, in fact, is proper and admissible so long as it is "not wholly irrelevant." *United States* v. *Lazarus*, 425 F.2d 638, 641 (9th Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States* v. *Polizzi*, 500 F.2d 856, 888 n.54 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975); *United States* v. *Brasco*, 516 F.2d 816, 819 (1975), *cert. denied*, 423 U.S. 860 (1975).** In view of the relevance of the evidence and the lack of prejudice in this case, Judge Wyatt's refusal to grant the motion to strike was entirely proper.

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* In cases not cited by the defendant, reversals have occurred where the prosecutor gratuitously used the term "Mafia" as part of the pattern of prosecutorial misconduct. *United States* v. *Love*, 534 F.2d 8 (6th Cir. 1976); *United States* v. *Perry*, 512 F.2d 805, 807 (6th Cir. 1975).

** In *Brasco*, the question was briefed by both sides on appeal, but was not treated in this Court's opinion except by the statement that "appellant's other contentions are without merit." 516 F.2d at 819.

POINT II

The Trial Court Correctly Permitted Hypothetical Questions on Cross-examination of Character Witnesses Who Offered Their Opinion of the Defendant's Good Character.

Morgan next asserts error in the trial court's refusal to sustain his objection to a question asked of his character witnesses on cross-examination. Morgan produced five witnesses who testified as to their opinion of, and his reputation for, honesty, integrity and truthfulness.

On cross-examination of three of these character witnesses, the Government asked a hypothetical question designed to probe the witness' opinion: "If Mr. Morgan knew that Display Sciences was in receivership at the time he was selling shares of Display Sciences stock between May and June 1972 and didn't tell that to his customers, would your opinion of him change at all?" (Tr. 763, 854, 869). The first time such a question was posed a defense objection to it was overruled. No objection was made when a similar question was posed to subsequent witnesses.

Although appellate counsel attempts to rely on the first objection as preserving the issue as to the cross-examination of all three witnesses, counsel said nothing to indicate that his failure to register subsequent objections resulted from anything other than a decision to waive the point. If he believed the point important and worth pressing, he could easily have voiced an objection to the subsequent questions. The absence of even a perfunctory objection must be seen as a waiver. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

As to the cross-examination of the one character witness where an objection was made and overruled, some background will serve to place this issue in its full context. The witness, Norman C. Roberts, was not only a character witness, but also a licensed stockbroker who testified that he purchased and sold DSI stock both to clients and for his own account but in the innocent belief that DSI was a good company. (Tr. 735-36). He managed to mention, in his direct testimony, that around this time, the defendant suffered a tragedy, namely, the death of his mother. (Tr. 740). The Government's motion to strike that testimony was denied, although Judge Wyatt agreed that the evidence was irrelevant. (Tr. 741). Roberts thereafter testified to the defendant's good character, stating he "never heard any comments" to impugn Morgan's honesty, integrity and truthfulness and that, in Roberts' opinion, Morgan "is honest and truthful and has integrity." (T. 743).

Before cross-examination commenced, the prosecutor asked for an advance ruling on his right to inquire into a 1968 arrest of Morgan for public drunkenness, resisting arrest and assault, as well as a 1957 arrest for public drunkenness and assault. (Tr. 744). Judge Wyatt refused to allow cross-examination on these points. (Tr. 744). Against this backdrop, the prosecutor posed the relatively innocuous hypothetical question as to which error has been assigned, attempting to confront the character witness with the fact that his opinion failed to take into account any misconduct demonstrated by the evidence at trial.

Defense counsel attacks the cross-examination by proceeding from the incorrect premise that character evidence is "probative because it shows that the defendant enjoyed a good reputation *until the date which the alleged crime was committed.*" (Br. 25) (emphasis in original).

The rule is to the contrary. When the witness testifies to good character up to the present cross-examination may include acts up to the time of the witness' testimony. *United States* v. *Kelner*, 534 F.2d 1020, 1028 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3431 (1976); *United States* v. *Lewis*, 482 F.2d 632, 643 (D.C. Cir. 1973).

Morgan is also mistaken when he asserts that the cross-examination at issue here has never been approved. In *United States* v. *Blane*, 375 F.2d 249 (6th Cir. 1967), *cert. denied*, 389 U.S. 835 (1967), a character witness was cross-examined as to whether during the prior year he had read and believed newspaper stories, which stated that the defendant had misappropriated funds in a bankruptcy. The defendant was then on trial for that charge.* The court held that the District Court did not abuse its discretion in allowing that line of cross-examination. Cf. *Sloan* v. *United States*, 31 F.2d 902 (8th Cir. 1929) (questioned in *United States* v. *Blane*, *supra*).**

The claim that the cross-examination deprived the defendant of the presumption of innocence is equally un-

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* Although the opinion does not state this explicitly, a reading of the appendix against the recitation of the charges makes this clear.

** As to the use of a hypothetical question in cross-examining a character witness, it would have been possible at one time to register objection to the practice. *See Little* v. *United States*, 93 F.2d 401, 408 (8th Cir. 1937). However, with the change in the rule governing character evidence to permit elicitation of opinion evidence, F.R. Evid R. 405(a), use of hypotheticals to test the opinion comports with well-established practice in examining opinion witnesses. *See Heard* v. *United States*, 348 F.2d 43 (D.C. Cir. 1965); *Pasadena Research Laboratories, Inc.* v. *United States*, 169 F.2d 375 (9th Cir. 1948); *United States* v. *Aspinwall*, 96 F.2d 67 (9th Cir. 1938); *Travelers Ins. Co.* v. *Drake*, 89 F.2d 47 (9th Cir. 1937).

supported. Morgan overstates the impact of the question in arguing that it caused the jury to assume his guilt. (Br. 33). Surely, even in the face of that question the jury realized full well that it was assigned the job of determining guilt and, of course, Judge Wyatt's charge reminded them that the defendant is "presumed to be innocent and the presumption of innocence disappears only if and when you, the jury, are satisfied that the government has proved the charge beyond a reasonable doubt." (App. 61).

As to the purported prejudice, the hypothetical question raised nothing which was not already before the jury as a reasonable inference from the evidence. When compared to the kind of material traditionally permitted on cross-examination of a character witness, this was innocuous indeed. *United States* v. *Booz*, 451 F.2d 719 (3d Cir. 1971) (cross-examination as to defendant's court martial 13 years prior); *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971) (cross-examination of character witness as to defendant's arrests 14 and 29 years prior, which resulted in no convictions); *United States* v. *Sanders*, 192 F.2d 409 (D.C. Cir. 1951) (cross-examination about arrest where order of *nolle prosequi* had been entered); *Mannix* v. *United States*, 140 F.2d 250 (4th Cir. 1944) (cross-examination as to defendant's prior arrests and prosecutions).

In rulings on character evidence, the District Court has wide discretion and will only be reversed on appeal upon a clear showing of prejudicial abuse. *Michelson* v. *United States*, 335 U.S. 469 (1948); *Mullins* v. *United States*, 487 F.2d 581 (8th Cir. 1973); *United States* v. *Silverman*, 430 F.2d 106 (2d Cir.), *modified*, 439 F.2d 1198 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971);

United States v. *Dibuzzi*, 393 F.2d 642 (2d Cir. 1968). Here Judge Wyatt permitted a parade of five character witnesses although it was in his discretion to limit such proof. *United States* v. *Zane*, 495 F.2d 683 (2d Cir. 1974), *cert. denied*, 419 U.S. 895 (1974) (no error in limiting character witnesses to five); *United States* v. *Kahan*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974); *United States* v. *Jacobs*, 451 F.2d 530 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (no abuse in limiting character witnesses to three); *Petersen* v. *United States*, 268 F.2d 87 (10th Cir. 1959) ("harsh," but not reversible, to limit character witnesses to one). Furthermore, the Court gave Morgan the favorable charge that character evidence alone could raise a reasonable doubt, (Tr. 1140), an instruction which has been held to be discretionary where the defense does not rest on character evidence alone. *Oertle* v. *United States*, 370 F.2d 719, 727 (10th Cir. 1966), *cert. denied*, 387 U.S. 943 (1967); *United States* v. *Minieri*, 303 F.2d 550, 555 (2d Cir. 1962). Against all this, the cross-examination of Roberts hardly amounts to prejudicial and reversible error.

POINT III

The Trial Court Was Within Its Discretion in Limiting Proof of Remote and Collateral Matters.

On cross-examination of three Government witnesses who had been Van Alstyne salesman, Morgan's counsel sought to elicit testimony as to representations made to those witnesses by Henry McCarthy, a non-defendant officer of DSI. (Tr. 428-31, 436, 498-99, 593-94). The theory behind defense counsel's efforts was that if McCarthy made misrepresentations to these witnesses, he probably made misrepresentations to Morgan as well.

We do not dispute that Morgan's assertion of a good faith defense gave him the right to prove what *he* was told by officers of DSI, such as Dell'Aglio and McCarthy. Indeed, Morgan testified at length on that subject. (Tr. 712-17, 724-25, 775-76, 779-80, 921, 907-08, 958-60). Moreover, the court, in its discretion, also admitted testimony about misrepresentations made by Dell'Aglio to Roberts and Mrs Morgan, testimony which could properly have been excluded. When additional evidence of misrepresentations to third parties was sought, Judge Wyatt correctly drew the line.

Generally, questions of the admissibility of evidence are "to be determined subject to the rules of evidence and in doubtful cases subject to the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of clear abuse of that discretion." *United States* v. *Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976). *See also Hamling* v. *United States*, 418 U.S. 87, 124-25, 127 (1974); *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). The power of the court, in its discretion, to exclude evidence, even if relevant, is explicitly codified in Fed. R. Evid. 403.

Here Morgan sought to adduce evidence that was confusing and remote. The purported relevance was based on the strained inference that if McCarthy told something to certain salesmen, who were not insiders at DSI, he probably told the same thing to Morgan, who, by contrast, had been deeply involved with the company over the past two years. This Court has said that relevant evidence may become more susceptible to exclusion where its probative value is reduced by the "length of the chain of inferences necessary to connect the evidence with the ultimate fact. . . ." *United States* v. *Ravich*, 421 F.2d 1196, 1204 n.10 (2d Cir. 1970), *cert. denied*, 400 U.S. 834 (1970). *Accord United States* v. *Robinson*, *supra*.

Here, the chain of inferences was missing a link, namely, some basis for inferring that McCarthy told Morgan precisely what he told the Van Alstyne salesman.

The cases cited by appellant, *United States* v. *Nixon*, 418 U.S. 683 (1974); *Ohio Associated Tel. Co.* v. *N.L.R.B.*, 192 F.2d 664 (6th Cir. 1951), support only that which the Government concedes, that proof of what Morgan was told is relevant. They simply do not speak to Morgan's claim that proof of misrepresentations made to third parties is relevant. At best, such evidence is a remote and collateral matter, and thus properly subject to exclusion in the exercise of the District Court's discretion. *Keys* v. *School District*, 521 F.2d 465, 473 (10th Cir.), *cert. denied*, 423 U.S. 1066 (1976); *International Shoe Machinery Corp.* v. *United States Machinery Corp.*, 315 F.2d 449 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); *United States* v. *Catalano*, *supra*; *Alford* v. *United States*, 282 U.S. 687, 694 (1931).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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) ss.:
COUNTY OF NEW YORK)

ALAN M. GOLDSTON, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 11th day of February, 1977 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

James C. Lang, Esq.
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Tulsa, Oklahoma 74103

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And deponent further says [illegible] placed the same in the mail drop for mailing at the [illegible] Courthouse, Foley Square, Borough of Manhattan, City of New York.

Alan M Goldston

ALAN M. GOLDSTON

Sworn to before me this

11th day of February, 1977

GEORGE L. NASH
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Qualified in Suffolk County
Commission Expires March 30, 1978

George L Nash